United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

411

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,434

MARK C. BOWSHER
and
ARLINE P. BOWSHER,

Appellants,

v.

DISTRICT OF COLUMBIA,
a municipal corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK P. FRIEDLANDER
MARK P. FRIEDLANDER, JR.
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Attorneys for Appellants.

STATEMENT OF QUESTIONS PRESENTED

1. Are the housing regulations of the District of Columbia based upon statutory authority?

2. Was the finding of fact by the trial court, that two sections (2403.2 and 2403.6) of the Housing Code were necessary for the health and safety of the public, based upon any substantial evidence?

3. If the housing regulations were based upon statutory authority, was the retroactive application legal or illegal?

4. Even if the housing regulations were based upon statutory authority and could be applied retroactively, was it proper to apply such regulations to the property which was not in danger of deterioration or blight, nor slum property?

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellants sued in the United States District Court for the District of Columbia, seeking to enjoin the enforcement of certain housing regulations by the District of Columbia. Appellants complained that the Appellee was seeking to force them to install a lavatory in

the existing bathroom of a basement apartment. They further asserted that the apartment was occupied by only one person and that the premises were not a slum area nor was said apartment in an otherwise blighted area, nor were the premises in danger of becoming a slum or blight.

The Appellants' basic claim was that there was no statutory authority for the housing regulations.

To this complaint the District of Columbia joined issue, claiming a statutory authority as well as the right to compel the installation of the lavatory in the existing bathroom.

There was no question but that the Appellants had exhausted their administrative remedy to the Board of Appeals and Review of the District of Columbia. After a trial upon the merits the complaint was dismissed, and from the judgment of dismissal the Appellants appeal.

This Court has jurisdiction of the appeal under Title 28 of the United States Code, Section 1291.

ASSIGNMENT OF ERRORS

1. The Court erred in determining that the housing regulations of the District of Columbia were based upon statutory authority.

2. The Court erred in finding that the two sections of the Housing Code referred to herein were necessary for the health and safety of the public, or that such finding of fact was based upon any substantial evidence.

3. The Court erred in finding that the housing regulations, even if based upon statutory authority, could not be applied to housing unless it was a slum area or in danger of deterioration or blight.

APPLICABLE SECTIONS OF THE HOUSING CODE

Chapter 1.
Interpretation, Definitions and General Provisions

Article 110

Interpretation and Definitions

". . . . . .

. . . . . .

"Section 1102 - Definitions

". . . . . .

. . . . . .

"'Bathroom' means any room or compartment containing a water closet, shower, or bathtub, or any combination thereof."

Chapter 2.
The Housing Code of the District of Columbia

Article 210

Purpose, Scope, Right of Entry, Penalty and Independence of Sections

"Section 2101 - Purpose of Regulations.

"The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted, and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline.

"The Commissioners further find and declare that such unfortunate conditions are due, among other circumstances, to certain conditions affecting such residential buildings and such areas, among them being the following: dilapidation, inadequate bathing or washing facilities, inadequate heating, insufficient protection against fire hazards, inadequate lighting and ventilation, and other insanitary or unsafe conditions.

"The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants.

"The Commissioners, accordingly, promulgate these regulations for the purpose of preserving and promoting the public health, safety, welfare, and morals.

". . . . . .
. . . . . .

Article 240

Facilities, Utilities and Services

". . . . . .
. . . . . .

"Section 2403 - Plumbing Facilities.

". . . . . .
. . . . . .

"2403.2 Each dwelling unit and each rooming unit shall have available for the use of the occupant or occupants thereof a lavatory, water closet, and bathing facility.

". . . . . .
. . . . . .

"2403.6 Any lavatory required to be installed by this Code shall be located in the room or compartment with the required water closet, or as close thereto as practicable: Provided, That where a lavatory is not provided in the same room with the water closet its specific location shall be approved by the head of the Housing Division of the Department of Licenses and Inspections."

STATEMENT OF FACTS

The Appellants herein acquired the property, 1006 South Carolina Avenue, S.E., in the District of Columbia, in November of 1938. They rented out the dwelling, consisting of three apartments. One apartment in the basement was occupied by only one person (App. 8). On November 8, 1960 Appellants were notified by one of the departments of the

District of Columbia that the said basement apartment in the premises was in violation of the housing regulations, and the District of Columbia demanded that the Appellants add a wash basin to the basement bathroom. From this requirement the Appellants appealed for a variance from strict compliance with the housing regulations. On March 2, 1961 this request for variance was disapproved by the Department of Licenses and Inspections.

Thereafter an appeal was taken to the Board of Appeals and Review of the District of Columbia, and said Board conducted a hearing on November 16, 1961, and sustained the Department of Licenses and Inspections (App. 5 - Pretrial Proceedings). The basement apartment involved herein had a bathroom which contained a water closet and bathtub. The bathtub contained a "gooseneck" faucet - that is, one elevated above the rim of the tub (App. 9). The bathroom, through this facility, had hot and cold running water (App. 9). The apartment also contained a kitchen which had the necessary utilities and equipment, and a sink with hot and cold water.

At the hearing before the Board of Appeals and Review for the District of Columbia there was no evidence offered as to any insanitary conditions existing (Record of transcript of testimony of hearing before the Board of Appeals and Review).

At the hearing in the court below the District of Columbia produced an employee of the District whose testimony was taken as to the health questions involved in this dispute (and said testimony is discussed under "Argument").

SUMMARY OF ARGUMENT

The District of Columbia contends that, under Section 1-226 of the District of Columbia Code, the Commissioners of the District of Columbia were empowered to make and enforce reasonable and usual police regulations such as they might deem necessary for the protection

of lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the District of Columbia. This statutory authority is insufficient to support the housing regulations, and the Commissioners are mere agents of Congress and have only such authority to promulgate regulations as the Congress has specifically vested in them in any given field, and the Congress has exclusive legislative jurisdiction over the District of Columbia. The section relied upon by the District of Columbia only authorizes the promulgation of reasonable and usual police regulations, and the housing regulations involved herein are not such reasonable and usual police regulations - particularly and especially since they are retroactive in their application to existing buildings.

The District of Columbia, after the pretrial of the cause, added to its claims of statutory authority the licensing regulations as found in Section 47-2345, and contended that under this licensing section they were entitled to promulgate the Housing Code. The strength of its position lies only in two decisions of this Court, which Appellants assert should be reconsidered and the law restated.

A consideration of the testimony of the expert called by the District of Columbia reveals that no public health problem was involved, and the Court's decision on that point was in error.

Appellants further say that the housing regulations are obviously predicated upon the existence of slums or otherwise blighted areas, and that the purpose of the regulations as declared in the preamble to said regulations was to prevent the creation of slums and the continuance of slums or slum areas, and such regulations were not to be generally applied to all housing in the District of Columbia. If, as the Appellee contends, these regulations are to be applied to all housing in the District of Columbia, then they cannot be based upon the District of Columbia Code, Section 47-2345, but must be based upon the District of Columbia Code, Section 1-226.

ARGUMENT

I

The Housing Regulations of the District of Columbia Are Not Based Upon Any Statutory Authority

Section 1-226 of the District of Columbia Code, 1961 Edition, provides:

> "§1-226. Regulations for protection of life, health and property.
>
> "The Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under sections 1-224, 1-225, as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia. (Feb. 26, 1892, 27 Stat. 394, Res. No. 4, § 2)."

The Preamble to the Housing Regulations (Section 2102, provides in part:

> ". . . . . .
> . . . . . .
>
> "The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare and morals of the community and its inhabitants.
>
> "The Commissioners, accordingly, promulgate these regulations for the purpose of preserving and promoting the public health, safety, welfare, and morals."

The inescapable conclusion from reading the Preamable and the District of Columbia Code provision is that the housing regulations were based upon the apparent authority given the Commissioners under Section 1-226 and upon no other Code provision. It will be noted that the housing regulations are made to apply under Section 2102 to all premises or parts thereof occupied, used, or held for use as a place of abode for human beings.

This Court should first consider the basis of the Commissioners' authority to promulgate housing regulations which are, in terms, applicable to existing buildings and are therefore retroactive in effect.

We submit that, before we consider the specific statutory authority claimed by the Commissioners, it would be well to note that the Congress has exclusive legislative jurisdiction over the District of Columbia; and we also submit that the Commissioners are mere agents of the Congress, and have only such authority to promulgate housing regulations as the Congress has specifically vested in them. The problem of the Commissioners being agents only already has been adjudicated by this Court in the case of Patrick v. Smith, 60 App. D.C. 6, 45 Fed. 2d 924 (1930). That case involved the Public Utilities Commission, and this Court stated that the Congress of the United States exercises exclusive legislative powers within the District of Columbia, and quoted from a decision of the Supreme Court of the United States, District of Columbia v. Bailey, 171 U.S. 161, 43 Law Ed. 118. The Supreme Court had noted that the District Commissioners are merely administrative officers with ministerial powers only. The Supreme Court had said:

> "The sums of municipal powers of the District of Columbia are neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting pro hac vice as the legislative body of the District, and the Commissioners of the District discharge the function of administrative officials."

When the instant suit was filed the District of Columbia answered the suit but did not cite in its answer the statutory authority it relied upon (App. 4, 5). At the pretrial of this cause the District of Columbia was required to state the statutory authority upon which it relied, and the Corporation Counsel on behalf of the District of Columbia asserted that it relied on Section 1-226 of the District of Columbia Code (1961 Edition) (App. 7). It is true that later in the proceedings the District of Columbia attempted to say that it also relied upon Section 47-2328 of the District of Columbia Code. Later herein we will discuss the

impossibility of any serious contention that such section could be relied upon in this case. Section 1-226 which the District apparently relied upon in promulgating the housing regulations merely authorizes the promulgation of reasonable and usual police regulations. There can be no serious doubt but that the said housing regulations are not reasonable and usual police regulations, especially since they are retroactive in their application to existing buildings.

Mention has been made from time to time of Section 1-228 of the District of Columbia Code. This section provides that the Commissioners may make and enforce building regulations for the District. The section does not, in terms, authorize retroactive regulations. There is no legislative history indicating such intent on the part of Congress. To the contrary, it clearly appears that Congress intended the building regulations to be prospective rather than retroactive. The history of the Act shows that the authority to make building regulations was attached to legislation relating to the sale of coal in the District of Columbia. No one can doubt but that the Congress in dealing with the sale of coal was looking to prospective acts and not retroactive acts. The authority for promulgating building regulations appeared immediately in the wake of a provision for the sale of coal and was not even a separate paragraph or sentence, and there can be no other conclusion drawn but that the same intent existed as to the building regulations authorized as that involved in the sale of coal.

Each time this question has been raised in the lower courts, cases are cited from other jurisdictions, and we point out to the Court that these cases are not authority even though they hold that building regulations may be retroactive - even in the absence of specific authority to make them so - because in each instance the building regulations were a legislative act of a true legislative body, as distinguished from a body such as the Commissioners of the District of Columbia, who are merely agents of the Congress. In the case of the City of Seattle v. Hinckley, 40 Wash. 468, 82 P. 747, the court said, at page 748:

> ". . . It may be conceded that the fundamental rule of construction of statutes is that they should not be construed to be retrospective unless the retrospective intent is expressed or can be plainly gathered from the provisions of the act. . . ."

We safely say that no such intent on the part of the Congress can be gathered from either Section 1-226 or Section 1-228. On the contrary, we submit that Congress has always been jealous of its legislative authority, and has retained such authority except where it expressly vested the same in the Commissioners; and the courts have recognized this and have uniformly held that the Commissioners have no such authority unless specifically delegated by the Congress, and have always held that there will be no implication of a delegation to the Commissioners of authority to regulate in any area where Congress itself has acted. Coughlin v. District of Columbia, 25 App. D.C. 251.

In the Coughlin case, supra, snow removal regulations were promulgated by the Commissioners, and the Commissioners as authority for such promulgation relied upon Section 1-226 of the District of Columbia Code. The Court held:

> "These repeated attempts at legislation, however ineffectual in their result, are sufficient to show that Congress reserved this subject (snow removal) for itself, and did not confer upon the Commissioners the power to regulate it."

It seems clear - and is earnestly submitted - that neither Section 1-226 nor Section 1-228 was intended to vest in the Commissioners authority to promulgate retroactive housing regulations of the type herein in question.

There are two sections of the District of Columbia Code which do allow regulation of existing buildings. These sections are 5-302 and 5-317, and the Court will note that in these statutes the Congress expressly said:

> ". . . building already erected, or which may hereafter be erected. . ." (5-302)

and

". . . building now existing or hereafter erected. . ."
(5-317)

The absence of such provisions in Sections 1-226 and 1-228 cannot be ignored. As a matter of statutory construction it is pointed out that when Congress wanted to confer upon the Commissioners the power to promulgate retroactive regulations, it said so. In the two aforementioned sections those fields which were to be regulated were expressly laid out and did not include housing regulations.

It was under these sections of the Code - 5-302 and 5-317 - or their statutory predecessors - that this Court correctly decided the case of Hill v. Raymond, 65 App. D.C. 144, 81 Fed. 2d 278.

In the case at bar the court below did not consider the difference in the wording of the congressional authority for the Commissioners' actions, but cited the Hill case as determining the right of the Commissioners to promulgate retroactive housing regulations.

This brings us to the very important consideration of Whetzel v. Jess Fisher Management Company, 108 U.S. App. D.C. 385, 282 Fed. 2d 943.* In the Whetzel case the question of statutory authority apparently troubled the Court, because the Court made inquiry on this point of all parties concerned in the litigation, and briefs were submitted; but it is obvious that no counsel approached the problem with a sufficient review of the cases to properly advise the Court. From the notes in the Whetzel case the Court will see that Section 47-2328 of the 1951 Code was considered as a possible authority for the District Commissioners to promulgate retroactive housing regulations. That section provides as follows:

"§47-2328. Classification of buildings containing living quarters for licenses-Fees-Buildings exempt from license requirement.

---

* This Court followed the Whetzel case in Nat. Bank of Washington v. Dixon, No. 16285, decided Nov. 30, 1961, but did not discuss the Whetzel case — only cited it.

> "The Commissioners of the District of Columbia are authorized and empowered to classify, according to use, method of operation, and size, buildings containing living or lodging quarters of every description, to require licenses for the business operated in each such building as in their judgment requires inspection, supervision, or regulation by any municipal agency or agencies, and to fix a schedule of license fees therefor in such amount as, in their judgment, will be commensurate with the cost to the District of Columbia of such inspection, supervision or regulation: Provided, however, That no license shall be required for single-family or two-family dwellings, nor for a rooming house offering accommodations for no more than four roomers. (July 1, 1902, 32 Stat. 626, ch. 1352, § 7, par. 28; July 1, 1932, 47 Stat. 555, ch. 366; July 22, 1947, 61 Stat. 402, ch. 296, § 3.)"

From an examination of this section of the Code it is obvious that the Commissioners were authorized and empowered to classify, according to use, method of operation and size, buildings containing living or lodging quarters of every description, and were also authorized to require licenses for the businesses to be operated in such buildings; but they were not allowed to require a license for single-family or two-family dwellings nor for rooming houses offering accommodations for no more than four roomers. By what stretch of the imagination could such authorization be construed to allow the Commissioners to make housing regulations to cover all buildings or parts thereof occupied, used or held out for use as places of abode for human beings (Section 2102 of the Housing Code)? What possible reasoning could be used to justify the promulgation of regulations for private residences under this section of the Code?

It also follows that a consideration of the Preamble (Section 2101 of the Housing Code) clearly shows that it was under Section 1-226 of the District of Columbia Code that the Commissioners felt that they were promulgating these regulations. It will be noted that not only is the language of the Preamble identified with the language of the Code Section 1-226, but when the Corporation Counsel was first required to state his authority, he stated Section 1-226.

In the Whetzel case this Court actually did not cite Section 47-2328 as authority for the housing regulations themselves, but only cited it as authority for the licensing regulations for limited type dwellings - which it is. The difficulty with the Court's reference to that section was that it was not coupled with a decision that the licensing section was the authority for the housing regulations; and that conclusion would have been necessary if we are to sustain the housing regulations on the basis of the licensing section. It is the position of the Appellants that such a reliance cannot be made. We respectfully contend that the licensing section is authority for requiring licenses and related conforming acts, but is not authority for a blanket housing regulation dealing with all housing in the District of Columbia, whether such housing is subject to licenses or not. We therefore are relegated in the consideration of this problem to determining whether Section 1-226 and Section 1-228 contain the necessary authority for the promulgation of a retroactive housing code. We think it is obvious that the licensing section referred to existing buildings and buildings to be erected, but we are convinced that Section 1-226 and Section 1-228 do not apply to existing buildings.

The difficulty with the Whetzel case is that in Footnote #13 to the opinion the Court found it unnecessary to decide whether there is statutory authority sufficient to support the application of Chapter II to dwellings containing less than two families, yet it is the heart of the problem as there is no statutory authority for the Housing Code unless it be found in these two sections.

This Court also fell into the error of construing Hill v. Raymond as having been decided under Section 1-228, when we believe that a correct interpretation of Hill v. Raymond is that it was construed under what might be termed the fire escape law or the egress law, and is not a building regulation case. If the Whetzel case was determined upon the basis that the Housing Code had for its authority Section 1-226 of the Code or Section 1-228 of the Code, then we ask this Court to carefully reconsider

the situation and determine that neither of the aforementioned sections of the Code allow the District Commissioners to promulgate regulations which are prospective in nature. Apparently, during the consideration of the Whetzel case, the proper consideration of these Code provisions was not submitted to this Court.

II

The Sections of the Housing Code Relied Upon by the District of Columbia Were Not Necessary to the Health and Safety of the Public

Presuming for the sake of argument that there was statutory authority for the Housing Code and that it was promulgated as a matter of the health and safety of the public, then was it in the matter of the health and safety of the public that a wash basin be added to the toilet and bathtub in the premises owned by the Appellants?

In the hearing before the District of Columbia Board of Appeals and Review, the District of Columbia did not present any authority to support this requirement, but at the trial of the case it produced one William H. Cary, Jr., who testified that the requirement of public health would be well satisfied by an arrangement by which a lavatory was in close proximity to a water closet; and he further said that he thought that a standard requiring closeness of a water closet and lavatory bore a relationship to public health (App. 14). On cross-examination he conceded that the source of the water for the kitchen sink, the bathtub and the toilet was the same, and that both hot and cold water were present in both kitchen sink and bathtub, and that dirty water would be drained into the same public system - whether it came from the toilet, the tub or the kitchen sink. He further testified that he had never seen the property, but it was undisputed that the faucet for the bathtub was a "gooseneck" one and was above the rim of the tub and that a person could wash his hands there (App. 19).

Insofar as Appellants can ascertain from the examination of the testimony of this witness, it was without force in attempting to require washing facilities to be separate from the facilities of the "gooseneck" faucet in the bathtub. We do not believe that the record supports the court's finding that any public health was involved in the attempt by the District of Columbia to add to the equipment in a bathroom, over and above that equipment required by the definition in the housing regulations themselves.

In Section 1102 of the housing regulations the District of Columbia had stated:

> "'Bathroom' means any room or compartment containing a water closet, shower, or bathtub, or any combination thereof."

If the housing regulations define a bathroom, is there any basis on the pretense of public health to add to the requirements so long as there is a place in close proximity to the toilet where a person may wash his hands? We have no quarrel with any requirements in new installations, and we believe there is authority for the District of Columbia to require all new housing or remodeled houses to meet standards which the District has set up, and the statutory authority for such requirements is the District of Columbia Code, Section 1-228; but we assert, and without fear of contradiction, that on retroactive regulations there is no authority for such requirements; but, irrespective of those statutory authority requirements, there is nothing in the evidence in this case - nor is there anything in fact - which would justify the requirement for the installation of this lavatory.

Many persons in the District of Columbia have reached the point where they feel it is no longer a question of the smallness of the costs as justifying an invasion of a person's property, and it is necessary in our opinion at this time to assert the right of the property owner to be secure subject to the right of the public not to be endangered. The

property owner in the District of Columbia should not be subject to the whims of the employees of the District of Columbia.

We therefore submit to the Court that the subjection of the Appellants to this claim of the District of Columbia should be rejected on the basis that there is not only no authority requiring the installation of the lavatory, but also on the basis that it bears no relationship to health or safety.

III

The Housing Code Is Applicable Only to Slum Property or Property in Danger of Deterioration or Blight

The above proposition is submitted to the Court on the basis of the Preamble to the Housing Code.

Presuming that the Housing Code is predicated upon the necessity of protecting the health and safety of the people, using the words of Section 2101 we state that the Commissioners of the District of Columbia found and declared that there exist in the District of Columbia residential buildings and areas which are slums and are otherwise blighted; and the Commissioners further found other such buildings and areas in the District which are deteriorating and which are in danger of becoming slums or otherwise blighted, unless action is taken to prevent their further deterioration and decline.

The Commissioners then made a finding and a declaration that the aforesaid unfortunate conditions were due, among other things, to dilapidation, inadequate maintenance, overcrowding, inadequate toilet facilities, inadequate bathing or washing facilities, inadequate heating, insufficient protection against fire hazards, inadequate lighting and ventilation, and other insanitary and unsafe conditions; and they went on to say and declare that where these conditions exist it is deleterious to the health, safety, welfare and morals of the community and its

inhabitants; and the Commissioners then said that that was the reason why they were promulgating these regulations. It is obvious that the Commissioners were concerned about slums and blighted areas and other buildings and areas which were in danger of becoming slums and otherwise blighted, and they mentioned that they would have to take action to prevent such further deterioration; and it is obvious that the further action that they felt they had to take was to promulgate the Housing Code.

In the case at bar there was no evidence of dilapidation, no evidence of inadequate maintenance, no evidence of overcrowding (only one tenant in the apartment), no inadequate toilet facilities, and there were certainly no inadequate bathing facilities - for the tub was there, and there was no evidence that it should be replaced. There was adequate heating, sufficient protection against fire hazard, sufficient lighting and ventilation, and the only thing that the District found fault with was that the washing facilities in the bathroom were provided by a "gooseneck" faucet in the bathtub and not by a separate lavatory.

But notwithstanding the lack of reason for the request by the Appellee for the installation of a lavatory, we still must accept the fact that the Commissioners were dealing with a problem which they felt existed in the slum areas or the fear that further deterioration in certain buildings would create additional slums. Is it the position of the District of Columbia that if the Appellants did not put a wash basin in the bathroom the property would become a slum or otherwise become blighted? We are certain it does not claim this; yet from a consideration of the Preamble to the Housing Code no other conclusion can be reached but that these regulations were meant solely and wholly to do away with

slums and prevent the creation of new slums; and if the District of Columbia had limited itself to such activity, there probably would be no one in the District who would contest its action, even though it might be unlawful.

Respectfully submitted,

MARK P. FRIEDLANDER

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JOINT APPENDIX

[Filed January 19, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK C. BOWSHER,
and
ARLINE P. BOWSHER
3102 Lyndale Place, S.E.
Washington, D.C.

Plaintiffs,

vs.

DISTRICT OF COLUMBIA,
A Municipal Corporation
District Building
Washington 4, D.C.

Defendant.

Civil Action No. 226-62

COMPLAINT TO ENJOIN ENFORCEMENT OF HOUSING REGULATIONS

1. Plaintiffs are residents of the District of Columbia and citizens of the United States and bring this action as owners of an apartment house which has been subjected to an order of the defendant acting through its Department of Licenses and Inspections. The defendant is a municipal corporation.

2. Jurisdiction is based on Title 11, Section 306 of the Code of Laws for the District of Columbia (1961 Edition).

3. The plaintiffs, in November, 1958, acquired premises 1006 South Carolina Avenue, Southeast, in the District of Columbia, known as Lot 24 in Square 970, improved by a row brick dwelling containing three apartments. Following application therefor a certificate of occupancy and license were duly issued.

4. In November, 1960, the District of Columbia, through its Housing Division of the Department of Licenses and Inspections, issued an order requiring the plaintiffs, among other things, to provide a lavatory in the basement bathroom, citing Section 2403 of the Housing Regulations.

5. The Housing Regulations for the District of Columbia were promulgated by the Commissioners of said District, August 11, 1955, pursuant to a proclamation declaring that certain residential buildings and areas within the District are slums or otherwise blighted; that other such buildings and areas are deteriorating and in danger of becoming slums or otherwise blighted; and that the purpose of the regulations is to prevent their further deterioration and decline, and to preserve and promote the public health, safety, welfare and morals. The Regulations in their entirety, as amended, are incorporated herewith by reference. The Regulations set forth certain standards for housing and further provide that application may be made to the Director of Licenses and Inspections for a variance from strict compliance and that his decision may be reviewed by a Board of Appeals and Review whose action shall be final.

6. Plaintiffs, having complied with the other requirements of the order, (they being of a minor nature and unnecessary to mention here) requested a variance from strict compliance concerning the lavatory on the grounds that adequate facilities for washing exist, that the work demanded would involve substantial difficulty and is in fact unnecessary to comply with the spirit and purpose of the Regulations. Despite a clear showing of the plaintiffs' position their request was denied by the Director and his action was sustained by the Board of Appeals and Review on November 16, 1961.

7. Plaintiffs believe and therefore aver that the subject premises are not a slum or otherwise blighted and are in no danger of becoming such; that on the contrary the premises are well-built, well-maintained, and provide safe, comfortable, healthful and wholesome living accomodations; that the Regulations were not intended to apply and do not apply to property of this category, nor retroactively to require structural changes in existing property.

8. Plaintiffs aver that the Housing Regulations as promulgated are without statutory authority; that they are vague and ambiguous; that their applicability is not clearly defined; that the discretion delegated to

the Director is unlawful; and that the denial of plaintiffs' request for a variance is arbitrary and capricious. That the enforcement of the order will result in irreparable damage to the plaintiffs and will deprive them of their property without compensation and without due process of law.

Wherefore the plaintiffs pray as follows:

1. That the District of Columbia be enjoined temporarily and permanently from enforcing the order of the Director of Licenses and Inspections.

2. That the Court issue a declaratory judgment declaring that the Housing Regulations are null and void insofar as they affect existing property which is not a slum nor an area about to become a slum or otherwise blighted.

3. That the Court declare that the retroactive enforcement of the Housing Regulations is unlawful.

4. That this Court declare that the said Housing Regulations are null and void and without Statutory Authority.

5. For such other and further relief as the Court may deem necessary and proper in the circumstances.

/s/ MARK C. BOWSHER
/s/ ARLINE P. BOWSHER

* * *

District of Columbia, SS:

Mark C. Bowsher and Arline P. Bowsher, being first duly sworn, on oath depose and say that they have read the foregoing and annexed Complaint by them subscribed; that the matters and things stated therein of their own knowledge are true and those stated on information and belief they verily believe to be true.

/s/ Mark C. Bowsher
/s/ Arline P. Bowsher

[Jurat dated Jan. 19, 1962]

[Filed January 26, 1962]

ANSWER OF THE DISTRICT OF COLUMBIA

First Defense

The District of Columbia says that the complaint fails to state a claim against it upon which relief can be granted.

Second Defense

1. The District of Columbia admits that it is a municipal corporation and that through its Department of Licenses and Inspections an order has been issued relative to the apartment house which is the subject of this civil action. The District of Columbia says that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph numbered 1 of the complaint.

2. The District of Columbia admits that this Court has jurisdiction over this action.

3. The District of Columbia says that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 3 of the complaint.

4 and 5. The District of Columbia admits the allegations contained in paragraphs numbered 4 and 5 of the complaint.

6. The District of Columbia admits that on November 16, 1961, the Board of Appeals and Review sustained the action of the Director, Department of Licenses and Inspections in the District of Columbia, but denies each and every other allegation contained in paragraph numbered 6 of the complaint.

7 and 8. The District of Columbia denies the allegations contained in paragraphs numbered 7 and 8 of the complaint.

Further answering said complaint, the District of Columbia denies all allegations not specifically admitted or otherwise answered.

/s/ CHESTER H. GRAY
Corporation Counsel, D.C.

/s/ JOHN A. EARNEST
Assistant Corp. Counsel, D.C.

/s/ GEORGE H. CLARK
Assistant Corp. Counsel, D.C.

/s/ JAMES M. CASHMAN
Assistant Corp. Counsel, D.C.
Attorneys for defendant

* * *

[Certificate of Service]

[Filed February 23, 1962] 2/23/62

PRE-TRIAL PROCEEDINGS

Action to enjoin enforcement of housing regulation.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS:

Ps Mark Bowsher and Arline Bowsher are and were at all times pertinent hereto owners of premises 1006 South Carolina Ave., S.E., Wash., D.C. The property was acquired by the Ps in November 1938. The Ps, as landlords rented out the dwelling, which contains three apartments. On or about Nov. 8, 1960, Ps were notified by the Housing Division of the Department of Licenses and Inspections of the D of C Government that the basement apartment in said premises was in violation of the Housing Regulations of DC and requiring the Ps to add a wash basin in the basement bathroom and they were given a specified period of time within which to bring the building into compliance with the Housing Regulations. On or about January 18, 1961, the Ps appealed to the Director, Dept. of Licenses and Inspections, for a variance from the strict compliance with the Housing Regulations. On March 2, 1961, the Dept. of Licenses and Inspections disapproved Ps' request for a variance from strict compliance with the regulations. D relies on Sec. 2403.2, Article 240, of the Housing Regulations of the D of C.

PLAINTIFF CLAIMS that their appeal from this decision refusing to grant a variance was denied. The housing regulations under which action was

taken were promulgated by the Commissioners of the D of C on Aug. 11, 1955, and related to residential buildings which were slums or otherwise blighted, or buildings which were deteriorating and in danger of becoming slums or otherwise blighted. The work required under the order was unnecessary and expensive.

The Ps have exhausted their administrative remedies and apply to this Court for a decision that said regulations are without statutory authority. They further claim that they are vague and ambiguous, and further assert that the discretion delegated to the Director is unlawful. They further assert that the denial of Ps' request for variance was arbitrary and capricious, and they further say that the enforcement of the order will deprive the Ps of their property without compensation and without due process of law.

Ps seek a declaratory judgment that the housing regulations are null and void insofar as they affect existing property which is not a slum nor an area about to become a slum or otherwise blighted. They further seek a declaration that the retroactive enforcement of the housing regulations is unlawful; and, thirdly, they ask the Court to declare that the housing regulations are null and void as being without statutory authority.

DEFENDANT asserts that the Ps appeal from the decision of the Dept. of Licenses & Inspections to the Board of Appeals and Review of the D of C; that the Board conducted a hearing on that appeal on Nov. 16, 1961, and on the same date, the Board unamimously sustained the action of the Dept. of Licenses and Inspections and in connection with said decision filed findings of fact and conclusions of law.

The D says that the action of the Board of Appeals and Review is based upon substantial evidence and is not arbitrary and capricious; that the premises 1006 South Carolina Ave., S.E. is subject to the Housing Regulations of the D of C and that it has attemped to enforce said Regulations; that Section 2403.2 of the Housing Regulations of the D of C, as applied to the subject premises, is reasonable and not arbi-

trary and that the application of said Regulations promotes the public health, safety and general welfare; that the application of said Regulations to the subject premises is fair on its terms and has not been applied to the Ps in a discriminatory manner; that the Housing Regulations of the D of C constitute a valid and subsisting exercise of the police powers of the District and that said regulations were lawfully promulgated by the Commissioners of the D of C pursuant to statutory authority. (Sec. 1-226, D.C. Code, 1961 Ed.); that Ps' allegations which challenge the action of the Board of Appeals and Review do not call for a de novo hearing, but that the hearing accorded Ps should be limited to a review of the record made before the Board of Appeals and Review.

STIPULATIONS

The parties agree to the mutual exchange in writing on or before April 2, 1962, of the name (s) and address (es) of witnesses, filing a copy thereof on or before said date with the Clerk of the Court.

The Housing Regulations of the D of C may be admitted in evidence.

The following may be admitted in evidence: P-1, D-1 through D-8, initialled by Examiner.

In addition, the D has documents marked D-9 and D-10 which he requests the P to agree may be admitted in evidence, but P will make no agreement with relation thereto.

The transcript of the hearing held by the Board of Appeals and Review on Nov. 16, 1961 may be admitted in evidence without formal proof subject to all proper legal objections, provided, counsel for the D furnishes counsel for the P a copy of said transcript on or before March 20, 1962.

TRIAL COUNSEL: Mark P. Friedlander, Esq. for the Plaintiffs; George H. Clark, Esq. for the Defendant.

/s/ MARK FRIEDLANDER
Counsel for Plaintiffs

/s/ GEORGE H. CLARK
Counsel for Defendant

/s/ JOHN J. FINN
Pretrial Examiner

[Filed November 20, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D.C.
Friday, May 25, 1962.

Before Judge WILLIAM B. JONES at 12:00 o'clock noon today, for trial.

APPEARANCES:

For plaintiffs:
MR. MARK P. FRIEDLANDER

For defendant:
MR. GEORGE H. CLARK
MR. JAMES M. CASHMAN

* * * * *

13 Thereupon

MARK BOWSHER

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDLANDER:

Q. Would you state your full name, sir. A. Mark Bowsher.

Q. Are you a member of this Bar? A. I am.

Q. How long have you been such a member? A. Since about 1943.

* * * * *

14 Q. Did there come a time when you acquired 1006 South Carolina Avenue, Southeast, a building? A. Yes.

* * * * *

Q. At the time you acquired it, what was it used for? A. As three separate apartments.

Q. And do you know how the apartments were located? A. One on each floor, including the basement.

Q. Who occupies the basement apartment? A. A lady by the name of Mrs.

Q. And who else occupies that apartment besides her? A. No

15 one else that I know of.

Q. She is the only occupant? A. Yes.

* * * * *

16 Q. How many rooms were in that apartment when you acquired it?
A. Two rooms and a bath.

* * * * *

THE WITNESS: In the basement apartment.

* * * * *

Q. And what was the front room? What was that used for?
A. I would say a combination living room and bedroom.

Q. And the second room? A. A kitchen room and a family room.

Q. And did the kitchen have any equipment there in the way of a sink? A. It had a sink.

Q. And it of course had a stove and so forth? A. And a gas range.

17 Q. That sink, did that have running water in it? A. Yes, sir.

Q. If you turned the faucet on, could you get cold water? A. Yes, sir.

Q. And if you turned the faucet on, could you get hot water?
A. Yes, sir.

Q. And how was the water heated? A. With an automatic gas hot water heater.

Q. And where was that located? A. It was located in the bathroom.

Q. And what else was in the bathroom? A. A water closet and a bathtub and a gas furnace.

Q. Did the bathtub have any particular type of faucet on it?
A. What I refer to as a gooseneck faucet, that is, elevated above the rim of the tub.

Q. And did the bathtub at the time and at all times mentioned now and in the past have a flow of hot and cold water, depending upon which faucet you turned on? A. Yes, sir.

Q. And was the hot water for the sink and the hot water for the tub heated in this hot water heater you have mentioned? A. Yes, sir.

* * * * *

18 Q. Did there come a time, because of the demands of the District of Columbia, you made a change in that bathroom so far as its condition?
A. Yes, sir.

Q. What did you do? A. I installed a partition.

* * * * *

43 WILLIAM H. CARY, JR.,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARK:

Q. Sir, would you state your full name. A. William H. Cary, Jr.

Q. And where are you employed, Mr. Cary? A. I am Chief of the Bureau of Environmental Health of the District of Columbia Department of Public Health.

* * * * *

45 Q. Would you tell us, Mr. Cary, briefly, if you will, of your educational background in this field of public health. A. I am a registered professional engineer, and I am a graduate of the University of Michigan in civil engineering. I have attended special courses at the University there in the School of Public Health, where I received a certificate of public health.

46 I have also attended advanced studies at Wayne University. I have had, as indicated, approximately 35 years of experience in related public health activities. I am a fellow of the American Public Health Association, a member of the Royal Society of Health of Great Britain; and during 1933 I served as a consultant to the Public Health Service on the National Housing Survey, and in 1935 and 1936 served as a consultant to them in the National Health Survey. I am a member of the Conference of Municipal Public Health Engineers, the Conference of State Sanitary Engineers, and other professional groups.

* * * * *

47 Q. Mr. Cary, are you familiar with the document which is entitled the Housing Regulations of the District of Columbia, a set of regulations promulgated by the Commissioners of the District of Columbia?

A. I am, sir.

Q. In what capacity did you become aware of those regulations and under what circumstances are you familiar with those regulations, sir? A. Well, when I first came to the District of Columbia in 1943,

the first meeting I attended on my embarkation on duty was a meeting of people interested in housing in the District of Columbia. This was during the war years when housing was very crowded and there was considerable need.

* * * * *

48 A. I was chairman of the technical committee that promulgated the regulations, that prepared them for promulgation.

Q. The function of this technical committee was the --

A. The drafting of the regulations.

Q. Mr. Cary, I am going to show you what has been received in evidence, as I understand it, by the Court, as Section 2403.2 of the Housing Regulations of the District of Columbia, and I ask you to read that. A. 2403.2?

Q. Yes, sir. A. (Reading) "Each dwelling unit and each rooming unit shall have available for the use of the occupant or occupants thereof a lavatory, water closet, and bathing facility."

* * * * *

52 (Copies of the specified sections of the Housing Regulations here received in evidence as Defendant's Exhibit 11 will be marked accordingly.)

* * * * *

BY MR. CLARK:

Q. Now, Mr. Cary, having in mind that specific regulation as you read it, and from your background and experience in the field of public health engineering, can you tell me what exists in the way of a relationship between a dwelling unit or rooming unit and the three particular items called for in this regulation, that is, a lavatory, water closet

53 and bathing facility? A. These are the three items that are considered by public health people to be the essential items for the removal of body wastes from the dwelling, for personal cleansing of the body and the hands and face.

The principal problem we have in the control of disease is

cleanliness, and hands play a tremendous part in actual spread of disease. The ability to keep clean is one of the principal ways in breaking the barriers for the spread of disease.

The proper disposal, of course, of human wastes removes the source of a good deal of infection. But if we don't cleanse the hands while in the use of the water closet, we begin to spread the possibility of infectious material -- and by that I mean disease-bearing material -- throughout our environment.

The closer to the source of this contamination we can provide the facility for removing the contamination, the less opportunity there is for spread of infection. The Public Health Service, for instance, has finished some several years ago some studies in Kentucky relating to the availability --

* * * *

54 Q. Mr. Cary, I show you now what has been received in evidence, Section 2403.6 of the Housing Regulations of the District of Columbia, and I ask you to read that -- aloud, if you will, please. A. Section 2403.6:

> "Any lavatory required to be installed by this Code shall be located in the room or compartment with the required water closet, or as close thereto as practicable: Provided, That where a lavatory is not provided in the same room with the water closet, its specific location shall be approved by the head of the Housing
>
> 55 Division of the Department of Licenses and Inspections."

Q. Now, Mr. Cary, based upon your understanding of what you have just read, and your background and experience in the field of public health engineering, can you tell me what relationship, if any, exists between the proximity of the lavatory to those other items, the water closet and the bathing facility? A. Specifically with respect to the proximity of the hand-washing facility, the lavatory, the water closet is the one I would like to address myself to particularly, because this is the important source of infection.

We know that if persons using the water closet forget to wash

their hands and go to another part of the dwelling, they carry with them this infection. We have demonstrated that the washing of hands in kitchen sinks is fraught with a good deal of danger.

We have demonstrated that one of the greatest sources of organisms indicative of sewage pollution comes from dirty hands being used in kitchen facilities, to the extent that in public places where food is prepared to be served to the public we don't permit --

* * * * *

56 Q. Mr. Cary, would you limit your responses to my questions to dwelling units and rooming units as I understand them in the Housing Regulations of the District of Columbia. A. The opportunities for spread of infection are greatly reduced by bringing the water closet as close, or the water closet and the lavatory, in as close proximity as they can be. When mother has attended baby, when any one of us has taken care of the requirements of nature, we find it is necessary and obligatory that we wash our hands before we return to the normal occupations of the household.

We know from family studies of the spread of infectious diseases -- in fact, we did a study among householders in Southwest Washington just prior to the destruction of this area -- that we had a much higher rate of certain types of enteric infection among families in that area where handwashing facilities were not readily available to the people who were using yard water closets and were going back into the dwelling unit and using the facilities used for the preparation of the food.

57 Q. Then as I understand you, sir, there is a direct relationship between the lavatory and in particular the water closet, -- A. Correct.

Q. -- in so far as the proximity of one to the other? A. That is right.

Q. What, sir, is the relationship to public health in general and in particular in the District of Columbia between this requirement that we have a lavatory in each dwelling unit and each rooming unit along with a water closet and bathing facility? A. I know of no studies that have been made that would particularize an answer for you. We do know

that in areas where these facilities were not available, that our rates of infectious disease are much higher than they were in areas of the community where the facilities were more readily available and more plentiful.

There are many other factors, however. I wouldn't want anybody to believe that this was the sole contributing factor, although we believe strongly, from evidence that we have, from studies that are available to us, that this played a very important part in the rates of infection in certain of the areas of the community where these facilities were not available.

58 Q. Would you say, Mr. Cary, that based upon your knowledge in the field of public health engineering there is a relationship to public health in connection with a water closet, the requirement of a water closet and a lavatory in close proximity one to another? A. There is a requirement of public health that would be well satisfied by this arrangement.

Q. And based upon your experience in the field of public health engineering, sir, do you think a standard requiring closeness of water closet and lavatory bears a relationship to public health? A. I do.

* * * * *

CROSS EXAMINATION

BY MR. FRIEDLANDER:

Q. Do you have any doctorate degrees? A. No, sir.

* * * * *

Q. Mr. Cary, Section 2101 of the Housing Regulations -- and I wonder if we might borrow counsel's copy and let the witness look at it.

Would you look at 2101 of the Housing Code and tell us whether you

59 helped prepare that (handing).

You are looking at Article 210, Section 2101? A. Section 2101?

Q. Yes. Did you help prepare that? A. This was part of the document that was prepared.

Q. Did you help prepare it, sir? A. Yes, sir.

Q. Then you understood, did you not, you were concerned with slum areas, did you not, or areas that might become slums? A. No, sir; we were concerned with the entire community.

Q. Can you explain, in your aid in preparing this section, why you used the words, "The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted"? Do you know why they put that in? A. This was put in because we were concerned with both buildings and slum areas.

Q. And did you not also help prepare the balance of that paragraph, which said, "and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline"? A. The committee of which I was a member prepared it.

60 Q. You were instrumental in preparing this whole code, were you not? A. I prepared it under direction of the Commissioners, sir.

Q. Irrespective of who told you to do it, is it not a product of your brain, primarily? A. Not necessarily, no, sir. I believe a good many people contributed to this code.

Q. Who was the person who had most to do or who did most towards writing up this document called the Housing Code, or Housing Regulations? A. I probably did a good share of it, sir.

Q. You probably did 80 per cent of it, didn't you? A. I wouldn't say it was that much, no, sir.

Q. Was it more than 80 per cent? A. I did a good deal of it.

Q. Was it 75 per cent of it? A. I have no way of knowing that, sir.

Q. Didn't you write it out first and then let the other people -- A. I prepared preliminary drafts of much of the material.

Q. And there were changes made after certain arguments. But primarily and essentially there remained just what you had drawn?

61 A. A good deal of it was drafted in my office, with my associates and myself, yes, sir.

Q. And the purpose of the regulations prepared -- Section 2101 -- was to clear up certain slum areas and prevent other areas from becoming slums, was it not? A. And certain buildings that were located in other areas where known hazards existed.

Q. Where you afraid they might become slums? A. Well, there were individual buildings in many areas where the area wouldn't become a slum but the building itself was slummy.

Q. Can you have a slum building in an area which is not a slum? A. Yes, sir; I could cite you a few of them.

Q. That is your opinion, that that could exist? A. It has existed in this community, sir.

Q. Have you ever seen the property involved in this case? A. I have never seen this property, no, sir.

Q. Then you are unable to help us as to whether this is one of those buildings which you would say is a slum? A. I couldn't answer on this.

Q. And you are not attempting to say that the building involved in this case is a slum building in a good area, or a building in a slum area? A. If it lacks the facilities that are indicated in the code, I would say it lacks some of the things that are considered essential to provide good health.

62

Q. I guess I do not make myself clear to you. I thought I had definitely asked you a question.

* * * * *

THE REPORTER (reading):

"Question: And you are not attempting to say that the building involved in this case is a slum building in a good area, or a building in a slum area?"

THE WITNESS: I don't know, sir. I have no knowledge of the situation.

BY MR. FRIEDLANDER:

Q. Now did you have anything to do with the definitions prepared and a part of this Housing Code? A. Yes, sir.

Q. Would you say that the definition which appears on page 2 of the Housing Regulations, under Section 1102, at the very top of page 2 -- do you see it, sir? A. Yes, sir.

63 Q. What do you understand, as an expert in the field of health, that a bathroom means, the word "bathroom"? A. The definition, you are asking me whether this definition satisfied my definition?

Q. I am just asking you what your understanding is. A. I have always considered a bathroom a room that contained either a water closet or a bathtub or both fixtures or additional fixtures such as might be supplied. Basically a room that contained a lavatory alone, which might be even a bedroom, because you frequently used to rent rooms in a hotel with running water, where a lavatory was supplied in the room; and certainly it wasn't a bathroom.

Q. Now a bathroom, quoted, under your definition, says it means any room or compartment -- and by "compartment" I take it we also mean "room," don't we? -- "containing a water closet, shower, or bathtub, or any combination thereof."

That merely means, as I read it -- and see if I am correct, sir -- that if a room contains a water closet and shower, it is a bathroom.
A. A water closet or a shower?

Q. And a shower. If it has a water closet and a shower, it is a bathroom. A. It would be a bathroom under this definition.

64 Q. If it has a water closet and a bathtub, it is still a bathroom?
A. Still a bathroom.

Q. And can you explain to the Court when you drew up the definition why you didn't insist that a lavatory be in a so-called bathroom?
A. There were many rooms in existence in the District of Columbia that contained either a single bathing facility or contained a single water closet, not both fixtures but one fixture; and this definition was designed to provide the basic definition for a bathroom which would be a room that contained either one of these fixtures or a combination of one or more of them, and could contain other fixtures.

Basically we wanted to know what a bathroom was when this definition was prepared.

* * * * *

65 Q. Now didn't the premises that you heard described here today, didn't it have a place where people could wash their hands? A. I am not aware of any place that it had that was available for hand-washing facilities.

Q. Did you hear Mr. Bowsher testify as to the gooseneck faucet on the bathtub? A. Yes, sir; but this is provided for an entirely different purpose, sir. This is provided --

Q. Excuse me, sir. Could you just tell me whether you heard him testify to that? A. Yes, sir.

66 Q. Having heard him testify that this gooseneck facility was above the rim of the tub, did it help you in visualizing what kind of a washing accommodation it was? A. It helped me visualize the connection that was at the tub.

Q. And that a person could, without getting in the tub, wash his hands at this faucet? A. I presume this would be possible, sir.

Q. And if a person washed his hands at this faucet, they would have hot and cold water, according to what you heard and what you know? A. Yes.

Q. And they could use soap? A. Yes, sir.

Q. And where would the water run from that tub? A. I presume it would run into the sewer outlet of the tub itself.

Q. And would that be dangerous to health to touch the hands that were washed after going to the bathroom, washed at a tub? Would that endanger the public health? A. It wouldn't endanger it, no, sir.

Q. Would the same water, to your knowledge, that was provided at the faucet in the tub be also provided in a lavatory in the same bathroom?

67 * * * * *

A. You are perfectly correct, sir.

Q. And doesn't the water running out of the lavatory go into the same public pipes or sewer as the water running out of the tub? A. Yes, sir.

Q. Now what would be the health condition that would be violated if a person washed his hands at the bathtub instead of in the lavatory?

A. The problem as far as public health is concerned -- which I presume you are trying to get to here -- is the fact that the bathtub is not as convenient for use, not designed for this particular type of use.

Q. How do you know that, sir? A. I have seen many of them. I have never seen a bathtub designed for washing hands, sir.

Q. When a person is in the bathtub, don't they often wash their hands in the tub? A. I presume you have to do this if you take a bath.

Q. Yes, sir. And can't you visualize a faucet which is above the rim of the tub which a person could wash the hands at? A. Yes, sir,

68 I can.

Q. Are you telling the Court, as an expert, from all those years of experience, that the public health is endangered if a person washes his hands over a bathtub instead of a lavatory? A. No, sir, I am not.

Q. Well now are you telling us, sir, that this provision for washing hands, as it states in 2403.2, provided that it had to be in one room? Will you look at 2403.2. A. 2403.2 does not say that they have to be in one room.

* * * * *

69 Q. Mr. Cary, is it your position that the water supply furnished to the toilets is different from the water supply furnished to the bathtubs or kitchen sinks? A. Not at all, sir.

* * * * *

Q. Now is it your position, sir, that the waste from the toilet and the water would go into a different pipe than the waste from the tub and the sink? A. No, sir.

Q. So we have, so far as you are concerned, a supply of water which runs to all the utilities, or facilities, that is, the tub, the toilet and the kitchen sink, all coming from the same source? A. Oh, yes, sir.

70 Q. And it all leaves and goes to the same place? A. To the same sanitary system, yes, sir.

Q. And that sewer runs into some sort of equipment we have to purify it so they won't pollute the Potomac? A. That would be helpful too, sir.

Q. And we therefore have to admit, do we not, sir, that the water comes from the same place and goes out to the same place, whether you use the kitchen sink or the bathtub? A. That is right, sir.

Q. Now presuming a person would wash his or her hands at the kitchen sink, would that endanger the public health? A. Yes, sir; this is of considerable concern to the Department of Public Health.

Q. I am not interested in what the Department of Public Health is concerned with; I am interested in the facts. And the question was, sir, in your opinion as an expert, would washing your hands in the kitchen sink be a danger to the public health? A. Yes, sir.

Q. And you mean by that, even if a person was washing off the residue from vegetables which had been peeled? A. This is in the course of the preparation of food. But I am thinking of washing hands

71 in the normal sense of doing many of the things in the household that involves the handling of filth or dirt or possible infectious material. Coming from the toilet, for instance, to the kitchen sink would be highly dangerous.

Q. Vegetables, as you know, sir, as I presume you know, generally are grown in dirt. A. Yes, sir.

Q. Which is fertilized by fertilizers which are not always made of chemicals. You know that, do you not? A. Yes, sir.

Q. Now would it be a grave danger to the public health for a person to wash the vegetables in a kitchen sink where they had been grown in a garden fertilized with manure? A. No, sir. I mean, manure is not usually considered to contain material that is infectious to man.

Q. It doesn't? A. It doesn't.

Q. But if a person had been to the bathroom and washed his hands in the kitchen sink, it is the Health Department's position and yours -- A. And mine, sir.

Q. -- that that is a danger to public health? A. Because of potential danger, yes, sir.

72 Q. When you wash your hands with soap, it removes the germs,

does it? A. Not entirely, sir. It is very difficult to get your hands sterile by this method.

Q. You have to use some sterilization method? A. The surgeons use a very well devised plan, in the surgical method of scrubbing.

Q. And you don't recommend that a housewife use the same sterilization method a doctor uses? A. Hardly, sir. I don't think this is necessary. But I think she should use good sanitary precautions.

Q. Washing your hands is what we are talking about. A. Yes, sir.

Q. Do you consider that a sanitary precaution? A. Yes, sir.

Q. But you know that won't get the germs off, don't you? A. Not all of them, that is right, sir. It will get the majority of them off.

Q. Will you tell us, sir, is your opinion supported by any expert writers? A. By and --

Q. By the writers, people who have written books on this subject. A. With respect to cleanliness of the hands?

73 Q. No. I learned that when I was very young, that that was very necessary. But I am speaking now of your theory that if a person washed his hands in the kitchen sink, it would become a source of danger to the public health. Can you quote one authority who has written any text that says that? A. From memory I cannot, sir. But this has been demonstrated.

Q. You use that word -- A. And demonstrated in studies I tried to speak about earlier that were done by the Public Health Service down in Kentucky. This was in the household.

Q. When you use the word "demonstrated, " you mean, do you not, some writing by some authoritative person as a result of either experience or experiment?

Now will you name to us and tell us whether you know of any documentation, by name of the author, or date of a publication and where it appears, that subscribes to this theory of yours. A. I have already indicated that summarily I am unable to do it.

Q. Can you tell us what you meant when you used the word "demonstrated" in your direct examination?

You used the wording, "it has been demonstrated." Do you mean that there was a demonstration in which a person with germs on his hands
74 washed them in the sink and created an experiment? Is that what you mean? A. No. I participated in studies, sir, myself where bacteriological examinations have been made, where these facilities were being used, and have shown that the bacteriological contamination was carried over to the fixture itself.

Q. When you say that you have participated in such an experiment or demonstration, do you mean that you physically engaged in that experiment? A. Yes, sir, I did.

Q. Where was it? A. In Detroit.

* * * * *

Q. And when did it occur? A. It occurred during the -- I think it was 1934, 1933.

Q. Who else participated in that, if you recall at this time? A. I don't recall the names of the people that did. Mr. F. O. Adams, who was assistant director of the laboratory in Detroit at that time, assisted me in setting up the experimental data.

This was done with some people that were working for us under
75 the C.W.A. and E.R.A. program. And I had 1500 ex-employees at that particular time running a number of kinds of demonstrations and experiments.

Q. Was this during the depression period? A. This was during the depression period, yes, sir.

* * * * *

THE COURT: * * *

In other words, I think what counsel wants to know is was it part of either the W.P.A. relief program, or the Civil Works Administration.

THE WITNESS: It was, WPA or CWA.

BY MR. FRIEDLANDER:

Q. Now will you tell us, sir, whether that experimert was reduced to writing? A. That experiment was reduced to writing; but it was never published.

Q. Where are the original records, if you know, of such an experiment? A. I wouldn't know where they are at this time, sir. This
76 is a good many years ago, and I don't believe the original records would still remain, even in the archives of the department.

* * * * *

Q. Now, sir, can you tell us whether that experiment has ever been repeated in the District of Columbia, in the Health Department? A. Not to my personal knowledge, it hasn't been repeated.

* * * * *

THE COURT: * * * What is meant by "blighted" as distinguished from "slum"? The reason I ask you that is counsel asked you about the Section 2101 and read to you about the Commissioners of the District of Columbia "hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted."

What does that "otherwise blighted" mean?

THE WITNESS: When this text was prepared, Your Honor, we had areas in the District that definitely had reached the bottom of the slum level. I am referring particularly to some of the areas in the Southwest. But there were other areas in the community, speaking about 16th Street, for example, where there was a small group of deteriorating
77 buildings, buildings that the taxes had become very great on the property, and the buildings were old frame buildings which had not yet reached the point where they were of the same character as slums, and were surrounded by a better neighborhood. This was a blight on this better neighborhood.

THE COURT: And if the same buildings had been in a larger area of the same type, that would have been a slum?

THE WITNESS: We would have classed them as a slum.

* * * * *

S. TUDOR STRANG,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARK:

Q. Will you state your name, sir, and your employment.

A. I am S. Tudor Strang, Deputy Superintendent of the Housing Division, Department of Licenses and Inspections.

78 Q. Mr. Strang, would you describe briefly for us your functions as Deputy Director of the Housing Division of the District Government.

A. My functions are to make sure the Housing Division performs its activities in all its fields on the day to day work. I supervise all of the branches.

* * * * *

Q. Are you aware, sir, that we have been inquiring into the condition of the premises 1006 South Carolina Avenue, Southeast?

A. Yes, I do.

* * * * *

80 Q. Do you have the records, sir, which indicate the circumstances under which this inspection was initiated with you here in court?

A. Yes, I do.

* * * * *

THE COURT: These are the department's records, as distinguished from the records before the Board?

MR. CLARK: Yes, they are, Your Honor.

* * * * *

[Filed Aug. 3, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK C. BOWSHER, et al., Plaintiffs,	)	
v.	)	Civil Action No. 226-62
DISTRICT OF COLUMBIA, a municipal corporation, Defendant.	)	

MEMORANDUM

Plaintiffs, husband and wife, sue to enjoin enforcement of an order served on them by the Director of the Department of Licenses and Inspections of the District of Columbia. The order directed plaintiffs to install, pursuant to the District of Columbia Housing Regulations, a lavatory in an apartment bathroom wherein there is located a water closet. Plaintiffs contend that the Regulations are void because they are (1) without statutory authority, (2) unreasonable, and (3) retroactive in their application with respect to plaintiffs' property. Plaintiffs further assert that defendant's denial of their request for a variance from strict compliance with the Regulations was capricious and arbitrary.

Plaintiffs' property which is involved in this action is a building containing three apartments. There is one apartment on the first floor, one apartment on the second floor and one apartment in the basement. At all times relevant here plaintiffs had a certificate of occupancy for the building and a license to operate an apartment house therein. The building was constructed sometime between 1910 and 1920. Plaintiffs acquired the property in 1958.[1/]

1/ The undisputed facts set forth in the pretrial order stated that the property was acquired by plaintiffs in November, 1938. However, the complaint alleges that the plaintiffs acquired the property in November, 1958, and plaintiff husband, when appearing before defendant's Board of Appeals and Review in November, 1961, stated that the plaintiffs then had the property three or four years. But whether the property was acquired in 1958 or 1938 is not material here.

The apartment house property is located at 1006 South Carolina Avenue, S.E. in the District of Columbia. The basement apartment is occupied by one tenant. It consists of a bedroom, a second room which is large and is used as a kitchen, a bathroom and a small hall. In the bathroom at the time the plaintiffs were ordered to install a lavatory there was a bathtub, a water closet, a gas furnace and a hot water heater. Immediately outside of the door of the bathroom there was located the kitchen sink. The bathroom is of sufficient size to accommodate a lavatory even with the partition which has been installed to separate the furnace and hot-water heater from the water closet and bathtub.

The order of the Department of Licenses and Inspections advised plaintiffs that the failure to have a lavatory in the bathroom was in violation of Section 2403 of the Housing Regulations. Section 2403.2 requires that each dwelling unit shall have available for use of the occupant a lavatory, water closet and bathing facility, and Section 2403.6 provides that any lavatory required to be installed by the Regulations "shall be located in the room or compartment with the required water closet, or as close thereto as practicable" and that where a lavatory is not provided in the same room as the water closet its specific location must be approved by the head of the Housing Division of the Department of Licenses and Inspections. Obviously the Department would not approve any location but in the same room as the water closet since such was the command of the order complained of here.

Plaintiffs, after receiving the notice of violation, made written request pursuant to Section 2702 of the Housing Regulations for a variance from strict compliance with those Regulations. The request was denied by the Department of Licenses and Inspections, and plaintiffs, in accordance with the provisions of the Regulations, appealed to defendant's Board of Appeals and Review. The Board, on November 16, 1961, conducted a hearing on plaintiffs' appeal and thereafter sustained the Department's action denying the request for a variance. Plaintiffs then instituted this action.

Plaintiffs assert here that there is no statutory authority under which the Commissioners of the District of Columbia could promulgate the Housing Regulations. This contention is without merit. In Whetzel v. Jess Fisher Management Co., 108 U.S. App. D.C. 385, 390-391, 282 F.2d 943 (1960), the Court of Cppeals found that there was statutory authority sufficient to support the application of the Housing Regulations to an apartment building housing more than two families. Here there were three rented apartments.

Plaintiffs contend that the Housing Regulations, promulgated in 1955, are illegal because of their retroactive application to the apartment house built forty or fifty years ago. In Section 2102 of the Housing Regulations it is expressly stated that the Regulations apply to all premises or parts thereof which are occupied, used or held out for use as places of abode for human beings. These regulations were clearly intended to be applicable to all buildings existing on the date of their promulgation as well as those that might thereafter be built. The Court of Appeals held in Hill v. Raymond, 65 App. D.C. 144, 145, 81 F.2d 278 (1935) that a District of Columbia regulation requiring the installation and maintenance of hall and stairway lights was applicable to existing buildings. There it was stated:

> The regulation promulgated under the act is in the nature of a police regulation, and is intended as a safeguard against accidents, not only in buildings to be erected but to those already in existence and being used for the purposes named in the act.

And such is the effect of the decisions in other jurisdictions. In City of Louisville v. Thompson, 339 S.W. 2d 869, 872 (Ky., 1960) it is stated:

> Legislation that is otherwise reasonable does not necessarily become unreasonable because it may require the repair, improvement, or even the removal of existing property in order to comply with it.

See also Adamec v. Post, 273 N.Y. 250, 7 N.E. 2d 120 (1937); Abbate Bros., Inc. v. City of Chicago, 11 Ill. 2d 337, 142 N.E. 2d 691, 694-695 (1957); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E. 2d 775, 780 (1959); Annotation, 109 A.L.R. 1117 (1937).

The Housing Regulations are invested with a strong presumption of validity. If the question as to whether they are unreasonable or arbitrary as applied to plaintiffs' property is fairly debatable, they must be upheld as valid. Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528, 532 (9 Cir., 1931); Sinclair Refining Co. v. City of Chicago, 178 F.2d 214, 217 (7 Cir., 1949); City of Louisville v. Thompson, supra; Paquette v. City of Fall River, supra. And see Berman v. Parker, 348 U.S. 26, 32 (1954).

The Board of Appeals and Review considered the Housing Regulations as they applied to plaintiffs' property and considered them reasonable. Judicial review of the Board's decision must be based upon the record of its proceedings. Robert A. Harris, et al. v. Walter N. Tobriner, et al., _____ U.S. App. D.C. _____, _____ F.2d _____, (Nos. 16617, 16710, decided May 3, 1962).

In addition to facts heretofore stated, the record made before the Board discloses that plaintiffs there took the position that there was no need for a lavatory in the bathroom where the water closet was located. Plaintiffs asserted that there was available hot and cold running water in the bathtub located in the bathroom as well as in the kitchen sink immediately outside the door of the bathroom. This showing did not persuade the Board to grant the variance. Furthermore, at the trial of this action defendant presented as a witness the Chief of Environmental Health of defendant's Department of Public Health. This witness qualified as one well experienced over many years in matters of public health. He testified that it was essential for the health of the occupant of the apartment and the public generally that there be in the room containing a water closet a lavatory with hot and cold running water in order that one using that room might there wash his hands. He also testified that it was a danger to health for one who had used the water closet to wash his hands in a kitchen sink where food was prepared for human consumption. In the opinion of the Court it is not unreasonable to require a lavatory to be installed and maintained in the same room in which there

is located a water closet. A similar charge of unreasonableness was rejected in City of Louisville v. Thompson, supra at 872.

At the hearing before the Board, plaintiff husband testified that in order to install the lavatory in compliance with the Housing Regulations, mechanical difficulties and problems would be encountered. He stated that in order to install the lavatory it would have to be connected with the hot and cold water lines, properly "grounded" (sic), connected to the waste lines and fastened to the wall. In order to make the connection with the waste lines which run into the floor, it would be necessary to break up the concrete floor, remove fixtures and break whatever cast-iron pipes and other things that are connected to the waste lines, in order that the used water would run into the sanitary sewer system. Plaintiff husband further testified that great inconvenience would be caused the tenant of the basement apartment while the work was being done. He estimated the total cost of installation of the lavatory would be $300. With respect to the cost, there is no justification for claiming that it would be unreasonable. In Adamec v. Post, supra at 123-124, the assessed value of the property to be improved was $13,500, while the cost of the improvements would amount to $5,000. But the Court did not consider such cost to be unreasonable. Moreover, since the health of the occupant of the apartment and the public generally is endangered without a lavatory in the same room as a water closet, overcoming what plaintiffs describe as mechanical difficulties and problems does not make an unreasonable demand on the owners of the apartment building. In this connection, plaintiff husband testified at the Board hearing that it would not be necessary to break up the entire concrete floor but only that area required for access to the waste pipe.

Plaintiffs also assert that the Housing Regulations do not apply to their property because their apartment house is neither a slum nor otherwise blighted, nor in danger of becoming a slum or otherwise blighted. They argue that by Section 2101 the Housing Regulations are limited in application to such types of property. But plaintiff husband

at the hearing before the Board testified that, because of other orders by the defendant, he had to replace rotten wood, replaster a part of a wall, repaint the steps of a rear porch, clean up trash in the yard and provide covers for trash cans. And as a result of another order of the defendant, he was required to install a wall separating the water closet and bathtub from the gas furnace and hot-water heater. All of this work was done as a result of plaintiffs being ordered to do so by defendant because of violations of the Housing Regulations. Such conditions indicate that plaintiffs' property has been deteriorating and, if the conditions had not been corrected, it was in danger of becoming at least blighted property.

But even if it could be said that plaintiffs' property was neither a slum nor otherwise blighted, nor in danger of becoming a slum or otherwise blighted, the Housing Regulations would be reasonably applicable to the apartment house because, as stated in Section 2101, the Commissioners promulgated the Regulations "for the purpose of preserving and promoting the public health, safety, welfare and morals" within the District of Columbia. This is a proper exercise of the police power and it is not unreasonable to determine that a room containing a water closet in which there was no lavatory made a condition dangerous to the health of the occupant of the apartment and the public generally. City of Louisville v. Thompson, supra at 872.

The record made before the Board does not compel a conclusion that the denial of the variance requested by plaintiffs was unreasonable and arbitrary. Plaintiffs would have the violation of the Housing Regulations continue. In other words, they would have no lavatory in the same room with the water closet. But, as has been stated before, such a condition is perilous to the health of the occupant of the apartment as well as of the public generally. To refuse to grant the variance and require compliance with the Regulations when the cost would be only $300 cannot be considered unreasonable.

Moreover, Section 2702 of the Housing Regulations provides that a variance may be granted only where, and to the extent necessary to

ameliorate exceptional or undue hardship "and only when compensating factors are present which give adequate protection to the public health, welfare, safety, or morals, and such variance can be granted without impairing the intent and purposes of the housing program of the District of Columbia as embodied in this Code [Housing Regulations]." The Board found that plaintiffs presented no credible evidence that a lavatory could not be installed in the same room with the water closet or of exceptional undue hardship by reason of any structural or mechanical difficulty resulting from such installation. In view of the limitations placed on the granting of variances, the Court is of the opinion that the Board on the record before it was justified in sustaining the denial of the request for a variance. But even if there were a question with respect to whether the variance should have been granted, there was ample room for a difference of opinion, and in such a case a court will not substitute its opinion for that of a governmental agency created and qualified to decide such questions. Selden v. Capital Hill Southeast Citizens Association, 95 U.S. App. D.C. 62, 64, 219 F.2d 33 (1955).

Judgment for defendant. This memorandum is to serve as the findings of fact and conclusions of law of the Court.

Counsel for defendant will present appropriate order.

/s/ William B. Jones
United States District Judge

August 3, 1962

[Filed Aug. 16, 1962]

ORDER

This cause came on for final hearing before the Court upon the evidence and argument of the respective parties, and after consideration thereof, the Court filed on August 3, 1962, its memorandum in which

appear its findings of fact and conclusions of law, and based hereon it is by the Court this 16th day of August, 1962,

ORDERED: That the defendant be, and it is hereby granted judgment.

/s/ Wm. B. Jones
JUDGE

[Certificate of Service]

[Filed Aug. 27, 1962]

NOTICE OF APPEAL

Notice is hereby given this 27th day of August, 1962, that MARK C. BOWSHER and ARLINE P. BOWSHER hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of August, 1962 in favor of the District of Columbia, a municipal corporation against said Mark C. Bowsher and Arline P. Bowsher.

By /s/ Mark P. Friedlander
Friedlander & Friedlander
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Serve: Chester M. Gray
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District Building
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Washington, D. C.

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 17, 434

MARK C. BOWSHER,
and
ARLINE P. BOWSHER,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

CHESTER H. GRAY,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant
Corporation Counsel, D. C.

HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington 4, D. C.

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellee, the question presented is:

Were District of Columbia Housing Regulations, as enforced against owners of a non-conforming apartment building, unreasonable or oppressive?

I N D E X

DISTRICT OF COLUMBIA CODE, 1961, CITED

REGULATIONS CITED

Housing Regulations of the District of Columbia:

OTHER AUTHORITY CITED

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*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 17, 434

MARK C. BOWSHER,
and
ARLINE P. BOWSHER,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellants' statement of the case, although substantially correct, is incomplete. Appellee, therefore, submits the following as an additional statement of the case.

Complaining of an order of the Director, Department of Licenses and Inspections, appellants, the owners of an apartment building in the District of Columbia, sought in the court below injunctive and declaratory relief (J. A. 1-3). The order complained of directed appellants to install, pursuant to the District of Columbia Housing Regulations,[1] a lavatory in the bathroom of one of the apartments in their building (J. A. 5).

Pursuant to Section 2702 of the Housing Regulations, appellants sought, from the Director, Department of Licenses and Inspections, a variance, which was denied. Appellants then appealed to the District of Columbia Board of Appeals and Review which, after consideration of their request for a variance, sustained by unanimous vote the action of the Director (J. A. 5-7).

---

[1] Section 2403: "Plumbing Facilities. Minimum basic plumbing facilities in buildings used in whole or in part to house one or more habitations shall be as follows: "

Section 2403.1: * * *

Section 2403.2: "Each dwelling unit and each rooming unit shall have available for the use of the occupant or occupants thereof a lavatory, water closet, and bathing facility."

Appellee answered the complaint and, after pre-trial proceedings at which it was stipulated that the transcript of the hearing conducted by the Board of Appeals and Review on appellants' request for a variance might be admitted in evidence without formal proof (R. 5-7), the case came on for trial in the court below. Received in evidence at the trial was the complete record of the proceedings conducted by the District of Columbia Board of Appeals and Review on appellants' request for a variance (J. A. 28).

The Chief, Bureau of Environmental Health, District of Columbia Department of Health, was then qualified as one well experienced over many years in matters of public health administration (J. A. 10-11). The substance of his testimony was that it is essential for the health of the occupants of housing accommodations and the public in general that any room containing a water closet contain also a lavatory with hot and cold running water in order that one using the facilities may have a convenient means of washing his hands. He testified also that it is dangerous to health if one who has recently used the water closet washes his hands in a kitchen sink where food is prepared for human consumption (J. A. 12-14, 20).

At the conclusion of the trial, the court below, upon consideration of the evidence adduced, including the record of the proceedings before the Board of Appeals and Review, found that the Housing Regulations are a proper exercise of the police power, by the Congress, vested in the Commissioners; that, as applied to appellants' building, the regulations are reasonable; and that, because the condition obtaining in the basement apartment of appellants' building is dangerous to the health of the occupant thereof or any member of the general public similarly situated, the denial of a variance was neither arbitrary nor was it capricious. Upon the basis of such findings, the court, on August 16, 1962, entered judgment denying appellants the injunctive and declaratory relief they sought and entered a judgment for the appellee (J. A. 31).

STATUTE INVOLVED

District of Columbia Code, 1961 Edition:

> Section 1-226. Regulations for protection of life, health, and property.
>
> The Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations in addition to those already made under sections 1-224, 1-225, as they may deem necessary for the

protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia. (Feb. 26, 1892, 27 Stat. 394, Res. No. 4, §2.)

ADDITIONAL REGULATIONS INVOLVED

Housing Regulations of the District of Columbia:

Section 2102--Scope.

The regulations contained in this Code shall apply to every premises or part thereof occupied, used, or held out for use as a place of abode for human beings.

Section 2301--Use and Occupancy.

No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations.

Section 2401--Facilities, Utilities and Services.

The owner or licensee of each residential building shall provide and maintain the facilities, utilities and services required by this part. Each such facility or utility shall be properly and safely installed, and be maintained in a safe and good working condition.

Section 2403--Plumbing Facilities.

Minimum basic plumbing facilities in buildings used in whole or in part to house one or more habitations shall be as follows:

2403.2 Each dwelling unit and each rooming unit shall have available for the use of the occupant or occupants thereof a lavatory, water closet, and bathing facility.

Section 2702--Variances.

Any owner * * * required to perform an act by this Code may be excused by the Director or Deputy Director of Licenses and Inspections or by the Board of Appeals and Review from the performance of such act, either in whole or in part, upon a finding * * * that the full performance of such act would result in exceptional or undue hardship by reason of excessive structural or mechanical difficulty: * * * Provided, That a variance may be granted only where, and to the extent, necessary to ameliorate such exceptional or undue hardship and only when compensating factors are present which give adequate protection to the public health, welfare, safety * * *. [Emphasis supplied.]

Section 2703--Appeal and Hearing.

Any owner * * * of any premises subject to the provisions of these regulations who is adversely affected by a determination made under the authority of these regulations may file an appeal in writing with the Board of Appeals and Review. Such appeal shall state the error alleged to be contained in any order * * * adversely affecting such owner * * *.

The Board of Appeals and Review shall provide the appellant with an opportunity for a hearing * * * and, if the appellant so requests, shall in addition permit him to present oral argument before the Board itself. The decision of the Board of Appeals and Review sustaining, modifying, or vacating notices issued under the authority of these regulations shall be final.

SUMMARY OF THE ARGUMENT

The Housing Regulations are a proper exercise of authority delegated by the Congress to make and enforce reasonable and usual police regulations on such subjects of municipal concern as "* * * the protection of lives, limbs, health, comfort and quiet of all persons and property within the District of Columbia."

Because of uncontroverted evidence that a condition obtained in the basement apartment of appellants' building which was dangerous to the health of the occupant thereof, the Housing Regulations, as enforced against appellants, were neither unreasonable nor were they oppressive. The requested variance from the strict compliance with the regulations was, therefore, properly denied.

ARGUMENT

I

The Housing Regulations were promulgated pursuant to statutory authority.

Appellants contend first that there is no statutory authority for the Housing Regulations. This contention is clearly without merit because in Whetzel v. Jess Fisher Management Company, 108 U. S. App. D. C. 385, 390-391, 282 F. 2d 943, it was held that

statutory authority for the regulations does exist. See also: Morgan v. Garris, ____ U. S. App. D. C. ____, 307 F. 2d 179; National Bank of Washington v. Dixon, 112 U. S. App. D. C. 183, 301 F. 2d 507.

Appellants say, however, that, even if there is statutory authority for the regulations, they are, because of their retroactive application, void and unenforceable against their building which was constructed prior to the adoption of such regulations.

But, by Section 2102 of the Housing Regulations, it is specifically provided that the regulations shall apply to all premises or parts thereof which are occupied, used or held out for use as places of abode for human beings. It was clearly intended, therefore, that the regulations, upon their adoption, were to be applicable to all buildings then in existence as well as those thereafter constructed. See and compare Hill v. Raymond, 65 U. S. App. D. C. 144, 81 F. 2d 278. Involved in that case was the construction of regulations promulgated pursuant to Section 1-228 and Sections 5-302 through 303, D. C. Code, 1961, which required respectively the owner of any building three or more stories high which is used as a tenement house to reconstruct non-conforming stairways and install and maintain hall and stairway lights. In disposing of a

contention that the regulations were not retroactive and, therefore, not enforceable against existing buildings, this Court said:

> * * * As to new buildings, it would constitute part of the construction; as to old buildings, it would call for the placing of lights in halls and stairways where lights had not theretofore been provided. This was a reasonable requirement placing no great burden upon the owner of the property in which lights had to be placed. The regulation promulgated under the act is in the nature of a police regulation, and is intended as a safeguard against accidents, not only in buildings to be erected but to those already in existence and being used for the purposes named in the act. (p. 145.)

That the Housing Regulations are usual and reasonable police regulations authorized by the Joint Resolution of February 26, 1892, Section 1-226, D. C. Code, 1961, cannot be seriously questioned since municipal ordinances of similar character have been long and consistently recognized as traditional exercises of police power delegated by the state to regulate on such subjects of municipal concern as the public health and safety. As the result of the exercise of such power, property owners have been required to make reasonable changes in buildings previously erected and to comply with new requirements and standards for the protection of health and safety, even though such buildings were constructed in full compliance with regulations then in effect. See 6 McQuillan,

Municipal Corporations (3d Ed.), §§ 24.05, 24.06; 9 Am. Jur. 197, 199-200, Buildings; Richards v. City of Columbia, 227 S. C. 538, 88 S. E. 2d 683; Paquette v. City of Fall River, 338 Mass. 368, 155 N. E. 2d 775.

Unlike many municipal ordinances, housing codes, from their very nature, operate retroactively in the sense that they are enforced as to buildings in existence, as well as to those thereafter constructed. It follows, therefore, that, even though appellants' building, when constructed, may have satisfied all the requirements of then existing regulations, no immunity was thereby acquired from any subsequent exercise of the police power. Queenside Hills Realty Co. v. Saxl, 328 U. S. 80, 90 L. Ed. 1096; Hadacheck v. Sebastian, 239 U. S. 394, 60 L. Ed. 348; Tenement House Department v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 233, 235, aff'd. 203 U. S. 583, 51 L. Ed. 328.

In Paquette v. City of Fall River, 155 N. E. 2d 775, supra, the owners of "cold water flats" brought an action for a declaration as to the validity of a housing ordinance requiring, among other things, the installation of facilities for hot water and the installation of lavatory basins and bathtubs or showers. The ordinance was passed pursuant to a general statute of the State of Massachusetts

which provides, in part:

> "* * * Every city * * * for * * * the preservation of life, health and morals * * * may regulate the inspection, materials, construction, alteration, repair, demolition, removal * * * of buildings and other structures within its limits * * * and may prescribe penalties * * * for every violation of such ordinances * * *." (p. 779.)

The Superior Court of Massachusetts held that, because the ordinance is of general application, applying with equal force to all dwellings in existence or thereafter constructed, whether of relatively modern construction or in a state of deterioration, it was void and unenforceable.

The Supreme Judicial Court of Massachusetts held, however, that the ordinance was a proper exercise of the city's police power delegated by the State, and reversed, saying:

> The plaintiffs contend that the ordinance is beyond the scope of the enabling act because (1) it is applicable to existing structures and (2) is an ex post facto law since "cold water flats" have no "inherent tendency to impair the health or comfort of the people or to increase unduly the risk of fire or lawlessness." With respect to the first part of this argument, the ordinance "is prospective in its operation, and applies to violations which continue after its passage, or which then come into existence." Commonwealth v. Roberts, 155 Mass. 281, 283, 29 N. E. 522, 523, 16 L. R. A. 400. There is no violation of the Constitution of the

> United States, art. 1, § 10, or of art. 24 of the Declaration of Rights. * * *
>
> The ordinance by establishing minimum requirements as to the conditions of occupancy of dwellings constitutes an invasion of vested property rights. But such an invasion is not necessarily unlawful. It is a settled principle that all contract and property rights are held subject to the fair exercise of the police power, Chicago & Alton R. Co. v. Tranbarger, 238 U. S. 67, 77, 35 S. Ct. 678, 59 L. Ed. 1204, and an owner of property acquires no immunity against its exercise by constructing a building in full compliance with contemporary laws. Queenside Hills Realty Co., Inc. v. Saxl, 328 U. S. 80, 82, 66 S. Ct. 850, 90 L. Ed. 1096. Commonwealth v. Roberts, 155 Mass. 281, 29 N. E. 522, 16 L.R.A. 400. See Baker v. City of Boston, 12 Pick. 184, 194; Commonwealth v. Alger, 7 Cush. 53, 84-85.
>
> (p. 780.)

Substantially to the same effect is City of Louisville v. Thompson (Ky., 1960), 339 S. W. 2d 869, 872. This was a declaratory judgment action challenging the validity of ordinances adopted by the City of Louisville as amendments to its minimum standards for habitable buildings' ordinance. The Court of Appeals held that the city ordinances, requiring that each dwelling unit be equipped with inside bathrooms and that each sink, lavatory, basin, bathtub and shower be connected to hot and cold water lines, were reasonable and within the scope of the police power delegated to the City of

Louisville and were not unconstitutional. The Court observed that:

> Comparable regulations have been upheld as reasonable in all states where they have been tested in the courts of last resort, being Maryland, Massachusetts, South Carolina, and Wisconsin. Givner v. Commissioner of Health of Baltimore City, 1955, 207 Md. 184, 113 A. 2d 899; Paquette v. City of Fall River, 1959, 338 Mass. 368, 155 N. E. 2d 775; Richards v. City of Columbia, 1955, 227 S. C. 538, 88 S. E. 2d 683; Bolden v. City of Milwaukee, 1959, 8 Wis. 2d 318, 99 N. W. 2d 156.
>
> * * * Legislation that is otherwise reasonable does not necessarily become unreasonable because it may require the repair, improvement, or even the removal of existing property in order to comply with it. * * *
>
> * * *
>
> We are of the opinion that the minimum housing standards attacked in this litigation are reasonable and within the scope of the police powers of the City of Louisville and, specifically, violate neither the 4th, 5th or 14th amendment of the federal constitution nor sections 2, 13, or 242 of the Kentucky Constitution.

The Court concluded with a quotation from Berman v. Parker, 348 U. S. 26, 32, 99 L. Ed. 27, 37, 75 S. Ct. 98, as follows:

> "A city has a broad discretion in the enactment of laws to preserve and promote the health, morals, security and general welfare of its citizens. Sufficient grounds exist for the enactment of an ordinance of this nature if it has substantial relation to a

legitimate object in the suppression of the conditions which the city authorities deem detrimental to the public good." Shaeffler v. City of Park Hills, Kentucky, Ky. 1955, 279 S. W. 2d 21, 22. Where reasonable minds may differ the ordinance must stand as a valid exercise of the police power. City of Louisville v. Puritan Apartment Hotel Co., Ky. 1954, 264 S. W. 2d 888, 890. "In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation * * *." [Emphasis supplied.]

II

The Housing Regulations are not unreasonable as enforced against appellants' apartment building.

Appellants contend next that, as enforced against their building, the Housing Regulations are unreasonable. They say in this connection that, because hot and cold running water is available in the bathtub located in the bathroom and also in the kitchen sink immediately outside the bathroom door, it is not necessary to have available, in the bathroom for one using the water closet, a lavatory.

What appears from the record is that, at the hearing in the court below, there was uncontroverted testimony by an expert in the field of Public Health Administration (1) that it is essential for the health of the occupant of appellants' basement apartment and of the

public in general that there be located in the room containing a water closet a lavatory with hot and cold running water, and (2) that it is dangerous to health if one who has used the water closet washes his hands in the kitchen sink where food is prepared for human consumption.

Upon consideration of the evidence and the administrative record, the court below concluded that "* * * it is not unreasonable to require a lavatory to be installed and maintained in the same room in which there is a water closet." The court said also:

> * * * The Commissioners promulgated the Regulations "for the purpose of preserving and promoting the public health, safety, welfare and morals" within the District of Columbia. This is a proper exercise of the police power and it is not unreasonable to determine that a room containing a water closet in which there was no lavatory made a condition dangerous to the health of the occupant of the apartment and the public generally. * * * (J. A. 30.)

However, it is now well established that it is not the function of the courts to pass upon the wisdom of regulations adopted in exercise of the police power, and where the question whether the regulation is unreasonable is fairly debatable, the regulation must be upheld. Sinclair Refining Co. v. City of Chicago (7th Cir., 1949), 178 F. 2d 214, 217; Marblehead Land Co. v. City of Los Angeles,

47 F. 2d 528, 529, cert. den., 284 U. S. 634, 76 L. Ed. 540; 52 S. Ct. 18; City of Louisville v. Thompson, supra; Paquette v. City of Fall River, supra.

III

The request for a variance was properly denied.

Appellants have apparently abondoned any contention that the action of the Board of Appeals and Review in denying their request for a variance is without warrant in the administrative record. In any event, the court below said, in this connection:

> The record made before the Board does not compel a conclusion that the denial of the variance requested by plaintiffs was unreasonable and arbitrary. Plaintiffs would have the violation of the Housing Regulations continue. In other words, they would have no lavatory in the same room with the water closet. But, as has been stated before, such a condition is perilous to the health of the occupant of the apartment as well as of the public generally. To refuse to grant the variance and require compliance with the Regulations when the cost would be only $300 cannot be considered unreasonable. (J. A. 30.)

IV

The Housing Regulations are not restricted in their application to "slum" or "blighted" property.

Appellants contend finally that, because their building is neither "* * * a slum nor otherwise blighted, nor in danger of becoming a slum nor otherwise blighted * * *," the Housing Regulations are without application. But, by Section 2102 of the Housing Regulations, it is specifically provided that:

> The regulations contained in this Code shall apply to every premises or part thereof occupied, used, or held out for use as a place of abode for human beings.

Although appellants have not seen fit to print, for the benefit of the Court, pertinent portions of the administrative record, it appears from the memorandum of the Court that, because of other orders by appellee, appellants were required "* * * to replace rotten wood, replaster a part of a wall, repaint the steps of a rear porch, clean up trash in the yard and provide covers for trash cans * * *"; and that, as a result of another order, they were "* * * required to install a wall separating the water closet and bathtub from the gas furnace and hot-water heater * * *" (J. A. 30).

The trial court observed that such conditions indicate that the property had been deteriorating and that, if the conditions had not been corrected, it was in danger of becoming at least blighted property.

CONCLUSION

The appellee respectfully submits, in view of all the foregoing, that the judgment of the District Court is in all respects correct and should, therefore, be affirmed.

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